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In the Supreme Court of the United States

OCTOBER TERM, 1981

NO.

GREGORY L. PORTER
Petitioner

v.

GUAM PUBLICATIONS, INC.
Respondent

Petition For A Writ of Certiorari To The Court of Appeals For the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit Court of Appeals reconsidered this case in the light of Gertz v. Robert Welch, 418 U.S. 323 (1974) as ordered by this court in its decision on plaintiff's prior Petition for Certiorari, 418 U.S. 908 (1974).

2. Whether the Ninth Circuit Court of Appeals breached the decisions of this court and its own decisions regarding standards of review of decisions by territorial courts on local matters.

3. Whether the Ninth Circuit Court of Appeals sua sponte without any basis in the record altered the law of this case and determined that an oral complaint made to a police officer in private constituted alternatively a judicial proceeding or a public official proceeding and therefore privileged under Sections 47.4 (1) and (4) Civil Code of Guam.

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PRIOR OPINIONS

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2. **Porter v. Guam Publications, Inc.**, 475 F. 2d 744 (1972).

3. **Porter v. Guam Publications, Inc.**, 418 U.S. 908 (1974).

4. Memorandum Order District Court of Guam filed June 2, 1977.

5. **Porter v. Guam Publications, Inc.**, Ninth Circuit Docket No. 79-4242 (9th Cir. April 23, 1981).

6. Order denying Motion for Rehearing (9th Circuit June 17, 1981).

JURISDICTIONAL GROUNDS

The judgment sought to be reviewed was entered April 23, 1981 by the United States Court of Appeals for the Ninth Circuit. A Petition for Rehearing was denied by that Court and filed July 17, 1981. A Motion for Stay of Mandate was mailed to the Clerk of Courts, Ninth Circuit Court of Appeals June 22, 1981 to permit filing of this petition. To date no order has been received from the Ninth Circuit. Jurisdiction is conferred on this court to review the judgement of the Ninth Circuit Court of Appeals under 28 U.S.C. $1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Congress shall make no law . . . abridging the freedom of speech or of the press; . . ."

The Fourth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> **U.S. Const. Amend. IV**

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
>
> **U.S. Const. Amend. V**

The Ninth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
>
> **U.S. Const. Amend. IX**

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> **U.S. Const. Amend. XIV**
> **Section I**

The Civil Code of the Territory of Guam provides in pertinent part as follows:

> "Privileged Communications. A privileged publication is one made: . . .

4. By a fair and true report, without malice, in a public journal, of (1) judicial, (2) legislative, or (3) other public official proceedings, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued."

Civil Code of the Territory of Guam Section 47

"43. Every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restrain or harm, from personal insult, from defamation, and from injury to his personal relations."

Civil Code of the Territory of Guam Section 43

"Libel' is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunne or avoided, or a tendency to injure him in his occupation."

Civil Code of the Territory of Guam Section 45

STATEMENT OF THE CASE

Gregory L. Porter, petitioner herein was arrested on the unsworn oral statements made by one Felix Pangelinan to a police officer in the Guam Department of Public Safety. This arrest was listed in a police log at the Police Department and the petitioner was booked, mugged and printed. The log was subsequently read by a newspaper reporter employed by defendant Guam Publications, Inc. Guam Publications, Inc. then published in its newspaper, the Pacific Daily News, a report which was substantially

similar to the police report. Petitioner did not commit any of the offenses charged or published and no prosecution was taken. Petitioner was not a public official, a public figure nor engaged in any public controversy.

A complaint was filed in the District Court of Guam on November 10, 1971 against Guam Publications, Inc., the arresting officer and the person making the false statements to the police. Only Guam Publications, Inc. is before this court, the Court of Appeals having deleted the latter two parties from the original appeal to the Ninth Circuit by that Court's order of November 14, 1972.

The District Court of Guam granted summary judgment for defendant Guam Publications, Inc. on December 23, 1971. The Court of Appeals affirmed that judgment (475 F. 2d 744 (1973). A Petition for Writ of Certiorari was filed with this Court. In a Memorandum of Opinion 418 U.S. 908 (1974) this Court granted certiorari, vacated the prior judgment and remanded to the Court of Appeals for "further consideration" in light of **Gertz v. Robert Welch, Inc.** 418 U.S. 323 (1974). The Ninth Circuit Court of Appeals declines to so consider this case as per this court's order and remanded it to the District Court of Guam 503 F.2d 561 (1974). The District Court of Guam upon motion for summary judgment by defendant issued its Memorandum Order of June 2, 1977 denying defendant's motion, and considered the case in the light of Gertz v. Robert Welch, (supra). The action was then tried before a jury in the District Court of Guam and based upon the verdict rendered,

judgment was entered for petitioner in the sum of $25,000 on March 30, 1979. Appeal was taken from that judgment by defendant to the Ninth Circuit Court of Appeals. That Court issued its opinion reversing the judgment entered below (Docket No. 79-4242, April 23, 1981).

Federal jurisdiction arises in the first instance pursuant to 48 U.S.C. 1424(a).

ARGUMENT I

THAT THE NINTH CIRCUIT COURT OF APPEALS FAILED TO COMPLY WITH THE ORDER OF THE UNITED STATES SUPREME COURT (418 U.S. 908, 1974) REQUIRING RECONSIDERATION OF THIS CASE IN THE LIGHT OF GERTZ V. ROBERT WELCH, 418 U.S. 323 1424(a).

The United States Supreme Court in its Memorandum Opinion dated July 8, 1974 418 U.S. 908 (1974) remanded this action to the Court of Appeals for further consideration in the light of **Gertz v. Robert Welch, Inc.** 418 U.S. 323 (1974). Rather than complying with this Court's Order the Court of Appeals remanded the case to the District Court stating that it should have the "first opportunity for the further consideration required by the Supreme Court." 503 F. 2d 561 (1974). The District Court of Guam did reconsider his case in the light of **Gertz** in its Memorandum Order of June 2, 1977. In the course of its discussion of **Gertz** the District Court found that material issues of fact did exist with respect to reporting

the allegations from the police blotter, failing to determine whether they had been verified and failing to investigate the accusations and charges. These factual issued were then left to jury determination. After this determination which was favorable to the plaintiff and nearly seven years after the Ninth Circuit had remanded the matter to the District Court it was again called upon to consider the case. In its opinion issued April 23, 1981 the court again did not analyze the case in light of **Gertz** but rather in the light of intermmediate California appelaate court cases.

Where the mandate is transmitted to a subordinate court and the instructions are precise and unambiguous, as we submit they are here, it is the duty of that court to carry it into execution. **Cook v. Burnley's Executors,** 78 U.S. 84, 24 L.Ed 84 (1871). The Court of Appeals did not do this and as will be discussed below the rulings of this court as well as the Ninth Circuit Court of Appeals alter the scope of review so that it may no longer consider this action unfettered by the decision of the District Court of Guam.

ARGUMENT II

THAT BY REVERSING THE DISTRICT COURT OF GUAM JUDGMENT AND A JURY VERDICT UPON WHICH IT WAS BASED THE COURT OF APPEALS HAS FAILED TO COMPLY WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND ITS OWN DECISIONS REGARDING SCOPE OF REVIEW OF DECISIONS

MADE BY TERRITORIAL COURTS ON LOCAL MATTERS.

The rule established by the United States Supreme Court and Circuit courts in reviewing decisions of territorial courts on matters of local concern is that there must be a clear or manifest error and the interpretation of the territorial court must be inescapably wrong. It is not sufficient for the Circuit Court or Supreme Court to merely disagree with the lower court's interpretation. **Bonet v. Texas Company (PR), Inc.** 308 U.S. 463, 84 L.Ed. 401 (1940); **Lord v. Territory of Hawaii,** 79 F.2d 761 (9th Cir. 1935); **Capital Insurance v. Globe Indemnity Company,** 382 F. 2d 63 (9th Cir. 1967); **Gumataotao v. Government of Guam,** 322 F. 2d 580 (9th Cir. 1963); **Government of Guam v. Dela Rosa,** Docket No. 79-1739 (9th Cir).

The District Court at the time this action was originally filed handled matters of purely local concern. The complaint filed November 10, 1971 alleges jurisdiction under Sections 62 and 82 Guam Code of Civil Procedure and there has been no assertion by any party or the court that the case involved anything but a matter of local concern. The Court of Appeals permitted the District Court of Guam to decide in the first instance a question of local law. This the District Court did. Neither the opinion set forth in the District Court's Memorandum Order nor the Court of Appeals' later opinion indicate in any way that the Guam statute is unconstitutional. Thus, the only question for consideration was whether the particular statute involved (Section 47.4 Guam Civil Code) would be applied and in what fashion.

The Court of Appeals has merely disagreed with the District Court of Guam in its interpretation of a local statute. This is apparent in the Court of Appeals citation of California intermediate appellate court cases in support of its own interpretation. There is no claim that the District Court of Guam committed manifest error or that its interpretation of a Guam statute is inescapably wrong.

ARGUMENT III

THAT THE COURT OF APPEALS SUA SPONTE WITHOUT LEGAL OR FACTUAL BASIS ALTERED THE LAW OF THIS CASE TO HOLD AN ORAL COMPLAINT MADE TO A POLICE OFFICER ALTERNATIVELY CONSTITUTES A JUDICIAL PROCCEDING OR A PUBLIC OFFICIAL PROCEEDING UNDER SECTIONS 47.4 (1) AND (4) GUAM CIVIL CODE.

The Court of Appeals made applicable to our factual situation Sections 47.4(1), (3) and (4) Guam Civil Code. At no time during the trial process were these sections considered to have any applicability to this case. They were neither raised by the trial court, the plaintiff nor the defendant. The pretrial order lists a fact to be decided by the jury whether a written verified charge or complaint was filed against the plaintiff charging him with any offense. This fact forms the basis for determination under Section 47.4(5), Guam Civil Code. The content and form of the pretrial order was agreed to by the defendant. The instruction to the jury, as per plaintiff's instruction No. 1, cited Section 47.4(5). This instruction was

given without any objection by defendant. The only time defendant has ever raised the matter of applicable statutory provisions is on appeal to the Court of Appeals in a passing reference at page 21 of its brief to Section 47.4(3) Guam Civil Code. Thus the matter decided on appeal by the Court of Appeals was raised in the appellate process for the first time. This is prohibited. **McGrath v. Manufacturers Trust Company**, 338 U.S. 241 (1949)

The Court of Appeals by virtue of its decision now holds that an oral complaint made to the police upon which no further action is taken constitutes alternatively a judicial proceeding or some other type of public official proceeding. Not even the defendant has posited that theory.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Dated the 15th day of July, 1981.

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DOUGLAS F. CUSHNIE

PORTER v. GUAM PUBLICATIONS, INC.

GREGORY L. PORTER,
Plaintiff-Appellee,

v.

GUAM PUBLICATIONS, INC.,
Defendant-Appellant.

No. 79-4242.

United Stated Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 4, 1981.
Decided April 23, 1981.

Appeal from the United States District Court for the District of Guam.

Before CHAMBERS, ELY and WALLACE, Circuit Judges.

ELY, Circuit Judge:

This action is an appeal from a judgement of the District Court of Guam, entered on March 30, 1979, following a jury verdict holding defendant-appellant Guam Publications, Inc. ("defendant") liable to plaintiff-appellee Gregory Porter ("Porter") for libel, in the amount of

1. Prior to **Gertz v. Robert Welch, Inc.** 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), a constitutional privilege extended, absent reckless or calculated falsehood, to a

$25,000. The case has previously been before this court. In an identically styled decision reported at 475 F.2d 744 (9th Cir. 1973), we affirm the District Court's order granting summary judgement for defendant on the basis of the constitutional libel privileges then existing which largly immunized from libel newspapers' reporting of public events:[1]

> Damages would be available against the [defendant] only if the falsity of the news report were attributable to reckless or calculated conduct. . . [T]his standard of malice would be satisfied only if the publisher "in fact entertained serious doubts as to the truth of his publication." There is nothing in Porter's allegations that raises, with adequate factual specificity, a genuine, triable issue in this respect.

475 F.2d at 745.

This judgement was subsequently vacated by the United States Supreme Court and remanded "for further consideration in light of **Gertz** v. **Robert Welch, Inc.**, [418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)]" 418 U.S. 908, 94 S.Ct. 3200,

newspaper's defamatory publication of an individual's involvement in events of public or general interest. See **Rosenbloom** v. **Metromedia, Inc.** 403 U.S. 29, 43–44 91 S.Ct. 1811, 1819-20, 29 L.E.d.2d (1971) (Brennan, J., plurality opinion), **St. Amant** v. **Thompson**, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968); **New York Times** v. **Sullivan**, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L. Ed. 2d 686 (1964). In **Gertz** the court limited the constitutional privilege to apply only to "public officials and public figures." 418 U.S. at 343-52, 94 S. Ct. at 3008-13.

2. Mr. Justice White would have affirmed this court's judgement on the ground that the publication was privileged

41 L.Ed.2d 1155 (1974).[2] In a per curiam order reported at 503 F.2d 561 (9th Cir. 1974), we stated that the District Court should be allowed the first opportunity for the further consideration required by the Supreme Court. Accordingly, the case is remanded to the District Court. It should vacate the judgement and make a determination in accordance with its appraisal of **Gertz v. Robert Welch, Inc.**, supra.

Porter's libel claim, successfully prosecuted after our remand to the District Court, arises from a news item in the "Police Blotter" section of the February 28, 1971 edition of the Pacific Daily News (published by defendant). The "Police Blotter" story accurately reported the contents of a "daily police bulletin" (a compilation of criminal complaint and arrest reports), which stated that on February 27, 1971 Porter had been arrested and booked for stealing a car and some cash. The police bulletin, itself accurate, was based on false charges by the complainant. Porter had had a dispute with his employer.

under the laws of Guam. 418 U.S. 908, 94 S.Ct. 3200, 3200, 41 L.Ed.2d 1155 (1974).

3. Guam Civil Code s 45 provides as follows:

> "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

Guam Civil Code s 43 provides that "[e]very person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from

Felix Pangelinan, who made accusations of theft to the police, resulting in Porter being arrested and taken from his home to the police station. Upon arrival at the police station, Porter was charged with theft, photographed, fingerprinted, booked, questioned, and ultimately released. No sworn complaint was filed against him and no arrest warrant was issued.

[1] Because Porter is not a public figure or public official, see **Wolston v. Reader's Digest Ass'n, Inc.**, 443 U.S. 157, 164-69, 99 S. Ct. 2701, 2706-09, 61 L.Ed.2d 450 (1979); **Time, Inc. v. Firestone**, 424 U.S. 448, 457, 96 S.Ct. 958, 966, 47 L.Ed.2d 154 (1976), the only constitutional constraint on the applicable Guam libel/defamation law[3] is that liability cannot be imposed without fault. **Gertz**, 418 U.S. at 347, 94 S.Ct. at 3010. See generally **Robertson, Defamation and The First Amendment: In Praise of Gertz v. Robert Welch, Inc.**, 54 Texas L. Rev. 199, 213-15, 220-29, 235-45 (1976). On appeal, defendant challenges the District Court's interpretation of statutory privilege the sufficiency of the evidence, the adequacy of the jury instructions, and the determination of damages. Because Porter

personal insult, from defamation, and from injury to his personal relations."

4. See note 3 supra.

5. The District Court refused to submit to the jury defendant's Proposed Instruction No. 5 on the statutory privilege issue.

6. Guam Civil Code s 47 provides in its entirety as follows:
A priviliged publication is one made:

has not stated a cause of action under Guam law, we reverse the District Court and need not address the parties' other arguments.

The Guam libel statute requires the allegedly defamatory publication to be "unprivileged."[4] Defendant contended throughout the proceedings on remand (as it did in the first round of this case), in its answer, motion for summary judgement, and during trial,[5] that the publication was privileged under Guam Civil Code s 47.[6] Apparently reasoning that (1) the issue of statutory privilege involved a disputed issue of material fact requiring jury determination or (2) the relevant privilege under s 47 was s 47.-4(5) rather than s 47.4(3) or (4), the District Court denied defendant's motion for summary judgement and ordered the trial of the case. See Memorandum Order dated June 1, 1977, at 2, 3-4, 7; Pretrial Order dated February 26, 1979, at 2-3, 5.

[2] Because we conclude as a matter of law that the "Police Blotter" news item in the February 28, 1971 edition of the Pacific Daily News was statutorily privileged under Guam law as a "fair and true report, without malice, in a public journal" of a

1. In the proper discharge of an official duty.

2. In any (1) legislative or (2) judicial proceedings, or (3) in any other official proceeding authorized by law: Provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under s 137 of this Code made of or concerning a person by or against whom no affirmative relief is prayed in such action, shall not be a privileged publication as to the person making such

"judicial" or "other public official procceding" or "of anything said in the course thereof," the District Counterred in denying defendant's motion for summary judgement. Due to the identify between the Guam and California statutes and the lack of any applicable Guam precedents, California cases are compelling authority for this interpretation. Tabor v. Ulloa, 323 F.2d 823, 824 n.5 (9th Cir. 1963). See Tiedemann v. Superior Court, 83 Cal.App. 3d 918, 924-27, 148 Cal.Rptr. 242, 246-48 (1978) (communications to the IRS, designed to initiate appropriate investigative and enforcement proceedings and must be considered a part of an official proceeding authorized by law and, hence, privilege under s 47.2(3); Imig v. Ferrar, 70 Cal.App. 3d 48, 54.57, 138 Cal. Rptr. 540, 542-44 (1977) formal charge or complaint to police department alleging officer misconduct are part of an "official proceeding" and, hence, privilege under s 47.2(3));

> allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action.
>
> 3. In a communication, without malice, to a person interested therein. (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) by one who is requested by the person interested to give the information.

Hayward v. Watsonville Register-Pajaronian and Sun, 265 Cap. App. 2d 255, 71 Cal. Rptr. 295 (1968) (a) newspaper article that reports, with substantial accuracy police arrest records crime reports, or criminal complaints, is privileged under 47.4 as a fair and true report of a judicial proceeding) **Glen v. Gibson,** 75 Cal. App. 2d 649, 171 P. 2d 118 (1946). **Accord, Schuster v. U.S. News & World Report Inc.,** 602 F. 2d 850, 854 (8th Cir. 1979) (contents of indictments are privileged); **Mathis v. Philadelphia Newspapers, Inc.,** 455 F. Supp. 406, 415-19 (E.D.Pa. 1978) (accurate reporting of police arrest records is privileged); **Fites v. Retail Credit Corp.,** 368 F. Supp. 1045, 1046 (D. Mont. 1975), aff'd, 537 F. 2d 384 (9th Cir. 1976) (same); **Piracci v. Hearst Corp.,** 263 F. Supp. 511, 513-16 (D. Md. 1966), aff'd. 371 F. 2d 1016 (4th Cir. 1967) (same): Restatement (Second) of Torts s 611, Comment d (1977) (same). See **Medico v. Time, Inc.,**_____ F. 2d_____, _____, No. 80-2077 (3d Cir. March 2, 1981), slip op at 8-25.

4. By a fair and true report, without malice, in a public journal, of (1) judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued.

5. By a fair and true report, without malice, (1) of the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

The Guam privilege statute was patterned after, and is identical to, the California privilege statute. See California Civil Code s 47 (prior to 1979 amendments).

Porter simply does not have a legally cognizable libel claim under Guam Civil Code s 45. Porter having presented no triable issue of fact, and defendant having been entitled to a judgment as a matter of law, defendant's motion for summary judgement should have been granted on the basis of statutory privilege under Guam Civil Code s 47.4. Accordingly, we reverse the judgement of the District Court and remand with instructions that the action be dismissed.

Reverse with directions.

JUL 2 - 1977
CLERK

IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

GREGORY L. PORTER Plaintiff, vs. GUAM PUBLICATIONS, INC., et al Defendants.	CIVIL CASE NO. 159-71 MEMORANDUM ORDER

A similar motion for summary judgment was decided by this Court once before on December 23, 1971. At that time the Court was of the opinion that even if the fact presented by plaintiff were true, the alleged libel was privileged as to defendant Guam Publications, Inc. and its management. On appeal, the Ninth Circuit affirmed, stating in part that ". . . in the absence of reckless or calculated falsehood, damages are not available for a newspaper's defamatory publication of an individual's involvement in events of public or general interest." (No. 70-1514).

Certiori [sic] was granted by the United States Supreme Court, which at that time was deciding the case of **Gertz v. Robert Welch, Inc.** 418 U.S. 323, 94 S. Ct. 2997; 41 L. ED. 2d 789 (1973). **Gertz** subsequently narrowed the scope of constitutional privilege that a newspaper might claim against private individuals where the alleged libel concerned matters of general

public interest. The Supreme Court reversed the Court's ruling in the instant case and remanded it for "further consideration of **Gertz** . . . " The Ninth Circuit Court of Appeals then issued an opinion stating *[w]* think that the District Court should be allowed the first opportunity for the further consideration required by the Supreme Court." 503 F. 2d 561 (1974).

In considering the new guidelines ennunciated by **Gertz** the Court is unable to grant defendants' motion for summary judgment because there are several material issues of fact requiring jury determination. The Court denies this motion while recognizing that libel cases inevitably concern the free expression guaranteed by the First Amendment and that there is often a compelling need for summary relief in order to avoid a "chilling effect" of freedom of speech and press. **Dombrowski v. Pfister**, 380 U.S. 479, 487 (1965).

For over ten years the U.S. Supreme Court has been delineating the scope of constitutional privilege that a newspaper may expect when it allegedly defames public officials or public figures or where the subject matter concerns matters of public concern. In **New York Times v. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964), the Court held that the First Amendment prohibits a public official from recovering damages unless he can prove that the defamatory statement relating to his official duties was made with "actual malice - that is with knowledge that it was false or with reckless disregard of whether it was false or not." Id., at 376 U.S. 279-80. 84 S.Ct. 710. Three years later, in the companion cases of

Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130, 162, 87 S.Ct. 1975, 18 L.Ed. 2d 1094 (1967), the Supreme Court extended the New York Times rule to include criticism of public figures.

In 1971, the Court extended the New York Times malice rule to its next logical step: to require a showing of calculated falsehood or reckless disregard where the defamatory accusation was against a private individual in a matter concerning public interest or concern (i.e. a newsworthy event). Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed. 2d 296 (1971).

Gertz v. Robert Welch, Inc. 418 U.S. 323 was decided three years later and the decision represented a retreat from the Rosenbloom decision. Gertz held that a state could constitutionally set a lesser privilege standard than the New York Times malic rule when a private individual was defamed, even though the alleged defamation concerned matters of public interest. The court did make it clear, however, that a state could never impose liability without fault (i.e. strict liability) when a suit for defamation was brought.

The Court must decide whether the allegations contained in plaintiff's complaint and affidavits are sufficient to make out a case of libel under the Guam libel statute and as set by the Gertz boundaries. At the time of the alleged defamation, Section 45 of the Guam Civil Code defined libel as:

> a false and unprivileged publication by writing, printing, picture, effigy and other fixed

> representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloguy, or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation. [Enacted 1953]

Defendants first contend that the newspaper's publication was not false because the plaintiff was in fact accused of stealing a cashbox, and therefore the statutory definition of libel has not been met. However, as Prosser points out in his Fourth Edition, truth only serves a defense where the defendant can prove that the original publication itself was true:

> If the defendant repeats the defamation as reported by another, it will not be enough to prove the fact of the report, without proving the truth of the imputation reported. (Prosser Torts 4th Ed., page 798).

Whether or not it was true that plaintiff did steal the cashbox is a question of fact which must go to the jury and of course cannot be decided on summary judgment.

Defendants next contend that the alleged libel is privileged. The Guam Civil Code defines privilege in pertinent part as follows:

> § 47. PRIVILEGED COMMUNICATIONS, A privileged publication is one made:
>
> By a fair and true report, without malice, in a public journal . . . (5) of a verified charge or complaint made by any person to a public official upon which complaint a warrant shall have been issued. (Enacted 1953).

First, the Court must determine whether this definition meets the requirements of Gertz and does

not impose liability without fault. Section 47 does not impose such strict liability; it provides for a simple and straightforward method by which a newspaper can be assured that its account of an accusation made to a public official will be privileged. Only when a newspaper publisher has failed or neglected to ascertain whether the accusation in question resulted in a warrant or whether it has been verified will the statutory privilege be lost. This section guarantees an absolute statutory privilege while at the same time requiring a minimal test as to the truthworthiness of the accusation.

Defendants, however, contend that the statute imposes liability without fault and is unconstitutional under Gertz. Such an argument is puzzling because defendants seem to be suggesting that the Court strike down the only section of the Guam Civil Code which provide it with a statutory privilege:

> . . . Under the Guam statutory scheme, a publisher may have taken every conceivable precuation to insure the accuracy of an offending statement and still be held liable for libel if he does not fall within one of the defined privileges of Guam Civil Code 347. Such a broad sweeping restriction will have a terribly chilling effect on the exercise of freedom of speech and should be held to violate the First Amendment of the United States Constitution under the new **Gertz** decision. (Defendant's Reply Memorandum P. 6).

The defendants have offered no citation to suggest that the Guam statute or its California counterpart (which was enacted in 1872) is unconstitutional. Moreover, Gertz makes it clear that a state is now to be given greater latitude in fashioning the scope of

privilege to be afforded its private citizens in libel cases. Ibid. at 418 U.S. 345-46.

A statute is presumed to be within the Constitution and should not be lightly struck down; also, in matters of interpretation, a constitutional construction is to be preferred. U.S. v. Approximately 633.79 Tons of Yellowfin Tuna, 383 F. Supp. 659 (S.D. Calif. 1974). Section 47 of the Guam Civil Code does not impose liability without fault; therefore it is constitutional under the Gertz decision. This section should not be read so as to provide for a statutory privilege at the exclusion of the broader privilege requirements under the First Amendment. Irregardless of whether defendants are able to obtain a statutory privilege under Section 47, they still retain the broader Gertz privilege, and they must be found to be somehow at fault in gathering the news story to be liable. The Guam Statute provides a grocery list where a publisher is certain that stories drawn from certain sources will be privileged (e.g. from a "verified charge or complaint"). At the same time a publisher is protected by a constitutional privilege, and unless the story was negligently gathered and published there will be no liability. Therefore, in words taken from defendants' Reply Memorandum, quoted above, if a publisher [has]taken every conceivable precuation to insure the accuracy of the offending statement," the resulting publication will be privileged.

At the time of the alleged libel (February 28, 1971), the Guam Civil Code spelled out the scope of statutory privilege that a newspaper could expect. Gertz does not retroactively change the scope of

constitutional privilege that a newspaper could have expected at this time because the **Rosenbloom** plurality opinion (extending the **New York Times** malice rule to private individuals) was not decided until June 7, 1971, several months after the alleged libel.

The pleadings, motions and affidavits make it clear that there is a substantial factual issue as to whether defendants were at fault or negligent in reporting the accusations taken from the police blotter -- either in failing to determine whether they had been verified or in failing to investigate these accusations and charges more fully. Such factual issues as to fault will require a jury determination.

Finally, defendants contend that **Gertz** does not even apply to the instant case, because "[the] **Gertz** court indicated that its decision was only addressed to publication of misstatements whose factual content would give warning that they were defamatory". (Page 4 of Defendants' Memorandum). Of course, whether or not the contents of the police blotter would warn a reasonable prudent editor of its defamatory potential is a fact question which must be left to the jury, with proper instructions.

While the court is unable to grant defendants' motion for summary judgment, it is quite clear that **Gertz** has not changed the **New York Times** malice rule regarding presumed or punitive damages:

> . . .It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for **actual injury**.

> . . . We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state defined standards of liability for defamation. (At 418 U.S. 349-50).

There is nothing in plaintiff's affidavits, pleadings or motions to suggest that the newspaper acted "with reckless or calculated falsehood", as required to recover punitive or presumed damages. Therefore, plaintiff will be restricted to actual damages at trial.

The court realizes that denial of such summary judgments often requires a newspaper to continue with costly litigation even though it might finally prevail on the merits. To expose a newspaper to a multiplicity of suits without providing for a sure method of summary relief will possibly have a "chilling effect," as defendants suggest. However, Gertz makes it clear that an individual's right to his good name and reputation is a basic concept of human dignity and that a state has a legitimate interest in protecting this right.

Defendants' motion for summary judgment is denied; however, plaintiff is to be restricted to actual damages at trial.

Dated_____June, 1977

CRISTOBAL C. DUENAS
JUDGE, DISTRICT COURT OF GUAM

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORY L. PORTER,

Appellant,

vs.

GUAM PUBLICATIONS, INC., ROBERT E. UDICK, JOSEPH C. MURPHY, and JOHN DOE,

Appellees,[1]

No. 72-1514
OPINION

[March 15, 1973]

Appeal from the United States District Court
for the Territory of Guam

Before: CHAMBERS, ELY, and WALLACE, Circuit Judges.

ELY, Circuit Judge:

This libel action arises out of a newspaper article published by appellees describing appellant's arrest for the theft of a cash box. In factual contrast, the warrantless arrest stemmed from an unsworn and assertedly false complaint that appellant had stolen an automobile. The District Court concluded that the publication was privileged and granted appellees' motion for summary judgment.

To overcome the traditional defense of newspaper privilege, appellant cites Guam Civil Code § 47, which provides in relevant part:

> "A privileged communication is one made . . . . [b]y a fair and true report, without malice, in a public journal, of . . . a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued."

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[1]The names of two others, originally designated as appellees, have, by this court's Order of November 14, 1972, been removed from the caption.

Appellant argues under this statutory authority that the publication was not privileged because (1) the report was unfair and untrue, (2) the complaint leading to his arrest was not verified, (3) a warrant had not been issued, and (4) the newspaper had been motivated by malice.

It is axiomatic that although a statute may bestow a privilege not otherwise available, a statute cannot constrict a privilege that is constitutionally conferred. Since *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), *St. Amant v. Thompson*, 390 U.S. 727 (1968), and *New York Times v. Sullivan*, 376 U.S. 254 (1964) demonstrate that the newspaper account in this case was constitutionally privileged, we reject appellant's argument that the Guam statute delimits the entire scope of privileged publications of police arrests.

Rosenbloom, *St. Amant* and *Sullivan* establish that in the absence of reckless or calculated falsehood, damages are not available for a newspaper's defamatory publication of an individual's involvement in events of public or general interest. Appellant's arrest was an event touching the community's "vital interest in the proper enforcement of its criminal laws." *See Rosenbloom*, *supra* at 43. The constitutional protection afforded the report of such an event must necessarily, although perhaps unfortunately, extend to "some erroneous publications as well as true ones." *St. Amant*, *supra* at 732. That the arrest was warrantless and predicated upon an unverified complaint is irrelevant to the compass of this privilege.

Damages would be available against the appellees only if the falsity of the news report were attributable to reckless or calculated conduct. As manifest in *St. Amant v. Thompson*, *supra* at 731, this standard of malice would be satisfied only if the publisher "in fact entertained serious doubts as to the truth of his publication." There is nothing in the appellant's allegations that raises, with adequate factual specificity, a genuine, triable issue in this respect.

Accordingly, the judgment of the District Court is

AFFIRMED.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 3-20-73—480

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORY L. PORTER Plaintiff-Appellee, v. GUAM PUBLICATIONS, INC., Defendant-Appellant.	No. 79-4242 ORDER

Before: CHAMBERS, ELY, and
WALLACE, Circuit Judges

The judges constituting the panel originally concerned with the subject case (Chambers, Ely, and Wallace), have voted unanimously to deny the Petition for Rehearing. Judge Wallace has voted to reject the suggestion for rehearing en banc, and Judges Chambers and Ely have recommended that the suggestion be rejected.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

AFFIDAVIT OF SERVICE

TERRITORY OF GUAM)
ss:
City of Agana)

I, DOUGLAS F. CUSHNIE, an attorney in the office of Cushnie & Fritzgerald, attorney of record for Gregory L. Porter, Petitioner herein, depose and say: That on the 16th day of July, 1981, I served three copies of the foregoing Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit on Guam Publications, Inc., by delivering the same to the Secretary in the offices of Ferenz, Williams, Gruskin & Ashton, counsel of record for the said Respondent, located at the Bank of America Building, Agana, Guam.

All parties required to be served have been served.

Douglas F. Cushnie
DOUGLAS F. CUSHNIE

SUBSCRIBED AND SWORN to before me this 16th day of July, 1981.

16th

Dorothea S.N. Furukawa
NOTARY PUBLIC

DOROTHEA S.N. FURUKAWA
Notary Public